



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

NO. **79-823**

BRUCE HANSON,
Petitioner

v.

**UNITED STATES OF AMERICA and
ROBERT D. MANES, SPECIAL AGENT,**
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT**

BRUCE HANSON,
Rt. 2, 33 Wildwood
Lewisville, Texas 75028
(214) 436-6471

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**UNITED STATES OF AMERICA and
ROBERT D. MANES, SPECIAL AGENT,**
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT**

Petitioner respectfully requests that a writ of certiorari issue to review the Order of the Court of Appeals for the Fifth Circuit entered July 17, 1979, which granted the Respondent's motion to dismiss for mootness. A copy of the Order of the Fifth Circuit Court of Appeals is attached hereto at Appendix "A".

OPINION BELOW

The Fifth Circuit Court of Appeals by its Order dismissed for mootness Petitioner's appeal of a District Court's Order, at the request of the Respondent on July 17, 1979. On September 6, 1979, the Fifth Circuit Court of Appeals denied Petitioner's request for rehearing and request for rehearing en banc. A copy of the Fifth Circuit Court's denial of rehearing and rehearing en banc is attached hereto at Appendix "B".

JURISDICTION

The Fifth Circuit Court of Appeals entered its Order granting dismissal on the 17th of July, 1979, and its denial of Petitioner's petition for a rehearing en banc on the 6th of September, 1979. Jurisdiction of the United States Supreme Court is invoked pursuant to Title 28, U.S.C., Section 1254(l).

QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeal's denial of a stay of execution of judgment of a District Court proceeding and then its subsequent granting of Respondent's motion to dismiss for mootness was a denial of Petitioner's appeal rights and a denial of due process.

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable provisions of Amendment V and Article IV, Section 2.0 of the United States Constitution are set forth at Appendix "C".

UNITED STATES STATUTES INVOLVED

The applicable provisions of 26 U.S.C. 7609 of the United States Code are set forth at Appendix "D".

STATEMENT OF FACTS

This action was commenced by the Respondents in the United States District Court for the Northern District of Texas, Dallas Division, under statutes involving the Internal Revenue Code of 1954 as amended. The Petitioner intervened under provisions of 26 U.S.C. 7609. The District Court awarded judgment to the Respondent for which the Petitioner filed notice of appeal and a motion to the District Court for a stay of execution of enforcement of the Court's order pending appeal. Said motion was denied by the District Court. The Petitioner immediately filed a motion with the Fifth Circuit Court of Appeals for a stay of execution of judgment pending appeal. The Fifth Circuit Court of Appeals denied this Motion (See Appendix "E") on April 16, 1979. Petitioner then submitted a motion to this Honorable Court requesting a stay of execution of the judgment pending an appeal which was denied on April 26, 1979. A copy of the Court's order is at Appendix "F". On June 18, 1979, the Respondent filed a motion to dismiss for mootness, which the Petitioner timely answered. The Fifth Circuit Court of Appeals granted the Respondent's motion on July 17, 1979 (Appendix "A") and then denied Petitioner's request for a rehearing en banc of the motion to dismiss for mootness on September 6, 1979, (Appendix "B").

REASONS FOR GRANTING THE WRIT

I

The Fifth Circuit Court of Appeals has issued a decision which is in total conflict with the decision of another circuit court of appeals.

II

The Fifth Circuit Court of Appeals has sanctioned such an unusual and unethical departure from the accepted course of judicial proceedings that it calls for the exercise of the United States Supreme Court's power of supervision.

REASON NO. 1 FOR GRANTING THE WRIT RESTATED

THE FIFTH CIRCUIT COURT OF APPEALS HAS ISSUED A DECISION WHICH IS IN TOTAL CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

The District Court of the Northern District of Texas granted the enforcement of an Internal Revenue Summons against certain third-party record keepers in spite of the objections raised by the Petitioner and then denied the Petitioner his requested motion for a stay of execution of judgment pending appeal. The Fifth Circuit Court of Appeals denied the Petitioner's request for stay of judgment pending appeal and then granted Respondent's motion to dismiss for mootness since the Respondent had already received the books and records from the third-party record keepers even though the Petitioner was attempting to appeal the order of the District Court. The decision of the Fifth Circuit Court of Appeals is contrary to that of the Third circuit Court of Appeals.

The Fifth Circuit Court of Appeals holds that since the summons has been complied with there is no live controversy. (*United States v. Carpenter*, 425 F.2d. 264, C.A. 5, 1970; *Baldrige v. United States*, 406 F.2d. 526, C.A. 5, 1969.) Third Circuit Court of Appeals holds contrary to that of the Fifth Circuit. There the Court of Appeals held that while the summons was enforced during the appeal, the controversy was still live because the order granting enforcement was still being challenged. (*United States v. Friedman*, 532 F.2d. 928, 931, C.A. 3, 1976.)

The Petitioner lives within the jurisdictional territory of the Fifth Circuit Court of Appeals. Had Petitioner lived within the jurisdictional confines of the Third Circuit Court of Appeals, Petitioner would have been accorded his appeal rights. Therefore, Petitioner has been denied the privileges and immunities accorded to citizens residing in the States within the jurisdictional confines of the Third Circuit Court of Appeals, which is contrary to Article IV, Section 2, of the United States Constitution.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The United States Supreme Court is therefore requested to grant Petitioner his request for a Writ of Certiorari.

**REASON NO. II FOR GRANTING THE WRIT
RESTATED**

THE FIFTH CIRCUIT COURT OF APPEALS HAS SANCTIONED SUCH AN UNUSUAL AND UNETHICAL DEPARTURE FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS THAT IT CALLS FOR THE EXERCISE OF THE UNITED STATES SUPREME COURT'S POWER OF SUPERVISION.

The United States Congress adopted Section 7609 of Title 26 of the United States Code on the 4th day of October, 1976, effective on the 28th day of February, 1977, with Public Law 94-455, Section 1205(a) and Public Law 94-528, Section 2(b). 26 U.S.C. 7609 grants to any person entitled to notice of a summons the right to intervene in respect to the enforcement of such summons under 26 U.S.C. 7604 as well as the right to stay the compliance of said summons. (See Appendix "D".) The right to appeal adverse decisions of the District Court is implicit in 26 U.S.C. 7609 as well as the right to intervene and stay the compliance of a summons.

"Except as to cases the court considers of greater importance, a proceeding brought for enforcement of any summons, or a proceeding under this section AND APPEALS, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date." (26 U.S.C. 7609(h)(2). Emphasis added.)

The Petitioner filed a motion for a stay of enforcement of the judgment with the District Court, the Fifth Circuit Court of Appeals, and the United States Supreme Court. The Petitioner at each level of the appellate system informed the courts as to why a stay was necessary; viz., if the stay was not granted the Petitioner's right to appeal would be vitiated by the records being obtained. The Fifth Circuit Court of Appeals denied the Petitioner's requested stay knowing full well that the Respondent would request a motion to dismiss for mootness when the summons were complied with. This is obvious from the way the Fifth Circuit Court has ruled in previous cases on mootness concerning I.R.S. summons enforcement. The Fifth Circuit Court deliberately denied the Petitioner's request in order to cover up any errors that were made by the District Court. This was clearly a denial of due process under the Fifth Amendment of the Constitution of the United States by the Fifth Circuit Court of Appeals.

Any argument that the Petitioner may move to suppress evidence obtained by the enforcement of the summons at a later time (*Donaldson v. U.S.*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d. 580, 1971,) is specious. The decision as made by the Fifth Circuit Court concerning mootness becomes RES JUDICATA as to the District Court's judgment. *Donaldson* was decided (5) five years before the enactment of 26 U.S.C. 7609 and was one of the reasons that Section 7609 was enacted; viz., to provide a citizen a means to intervene, stay compliance AND APPEAL if the citizen feels it necessary.

It has been said that the eyes of the courts are never limited to the mere letter of the law, but that they may look behind the letter to determine its true purpose and effect (*Holmes v. Jennison*, 14 Pet. 540), nor are they to be misled by mere pretenses; they may look at the substance of things. (*Pollack v. Farmers' Loan and T. Co.*, 157 U.S. 429.)

The actions of the Fifth Circuit Court have in effect been to thwart the legislative intent and action concerning the citizen's rights to intervene and appeal. They are of such gross injustice that it requires the United States Supreme Court's power of supervision by Writ of Certiorari.

CONCLUSION

Therefore, the Fifth Circuit Court of Appeals has erred in its order granting Respondent's motion to dismiss. Hence, Petitioner requests that the Petition for Writ of Certiorari in this matter be granted.

Respectfully submitted,

Bruce Hanson
Rt. 2, 33 Wildwood
Lewisville, Texas 75028
(214) 436-6471

Dated: November , 1979

CERTIFICATE OF SERVICE

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of November, 1979.

UNITED STATES OF AMERICA
ROBERT D. MAREK, SPECIAL AGENT
Plaintiff-Appellee

IRVING BANK AND TRUST CO., ET AL.
Defendants

BRUCE HANSON
Plaintiff-Appellant

ORDER

(Filed July 17, 1979)

Appeals from the United States District Court
for the Northern District of Texas

APPENDIX "A"**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 79-1834

**UNITED STATES OF AMERICA and
ROBERT D. MANES, SPECIAL AGENT,
*Plaintiffs-Appellees,***

v.

**IRVING BANK AND TRUST CO., ET. AL.,
*Defendant,***

v.

**BRUCE HANSON,
*Intervenor-Appellant.***

ORDER

(Filed July 17, 1979)

**Appeals from the United States District Court
for the Northern District of Texas**

Before CLARK, GEE and HILL, Circuit Judges.**BY THE COURT:**

**IT IS ORDERED that appellees' motion to dismiss the
appeals is GRANTED.**

/s/ CHARLES CLARK**/s/ Judge GEE****/s/ Judge HILL**

APPENDIX "B"**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 79-1834

**UNITED STATES OF AMERICA and
ROBERT D. MANES, SPECIAL AGENT,**
Plaintiffs-Appellees,

v.

IRVING BANK AND TRUST CO., ET. AL.,
Defendant,

v.

BRUCE HANSON,
Intervenor-Appellant.

ORDER

(Filed September 6, 1979)

**Appeal from the United States District Court
for the Northern District of Texas**

**ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC****Before CLARK, GEE and HILL, Circuit Judges.****PER CURIAM:**

The Petition for Rehearing is **DENIED** and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is **DENIED**.

ENTERED FOR THE COURT/s/ CHARLES CLARK**UNITED STATES CIRCUIT JUDGE**

APPENDIX "C"**Article IV, Section 2, of the United States Constitution:**

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Amendment V of the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX "D"**26 United States Code 7609:****(b) Right to Intervene; Right to Stay Compliance.-**

- (1) **Intervention.** - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.
- (2) **Right to stay compliance.** - Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a) (2)-
 - (A) notice in writing is given to the person summoned not to comply with the summons, and
 - (B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a) (1).

(h) Jurisdiction of District Court. -

- (2) Except as to cases the court considers of greater importance, a proceeding brought for the enforcement of any summons, or a proceeding under this section, and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date.

APPENDIX "E"

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 79-1834

**UNITED STATES OF AMERICA and
ROBERT D. MANES, SPECIAL AGENT,
Plaintiffs-Appellees,**

v.

**IRVING BANK AND TRUST CO., ET. AL.,
Defendant,**

**BRUCE HANSON,
Intervenor-Appellant.**

ORDER

(Filed April 16, 1979)

**Appeal from the United States District Court
for the Northern District of Texas**

Before CLARK, GEE and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for a stay of execution of judgment pending appeal is DENIED.

APPENDIX "F"

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543**

April 26, 1979

Mr. Bruce Hanson
Rt. 2 - 33 Wildwood
Lewisville, Texas 75028

Re: Bruce Hanson v. United States A-918

Dear Mr. Hanson:

Your application for stay in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"Denied
4/24/79
WHR"

Very truly yours,

MICHAEL RODAK, JR., Clerk

by

/s/ Patricia A. Dean
/s/ Assistant Clerk

No. 79-823

Supreme Court, U. S.
FILED

JAN 16 1980

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

BRUCE HANSON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**MEMORANDUM FOR THE
FEDERAL RESPONDENTS IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-823

BRUCE HANSON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE
FEDERAL RESPONDENTS IN OPPOSITION**

Petitioner seeks review of the decision of the court of appeals in this internal revenue summons enforcement case dismissing his appeal as moot.

The pertinent facts are as follows: Special Agent Robert D. Manes of the Internal Revenue Service issued summonses to Irving Bank and Trust Co.; J.C. Penny Co., Inc.; Sears, Roebuck & Company of Dallas, Texas; Loeb, Rhoades, Hornblower & Co.; and Dallas Federal Savings and Loan, to produce rec-

ords pertaining to petitioner's business transactions during 1976 and 1977. Petitioner did not file federal income tax returns for those years. At petitioner's request, these firms refused to comply with the summonses (II-Tr. 9).¹

The United States and Special Agent Manes thereafter sought enforcement of the summonses in the United States District Court for the Northern District of Texas. Petitioner intervened in the proceeding pursuant to 26 U.S.C. 7609(b)(1). At the hearing held by the district court, petitioner sought to show by examination of Special Agent Manes (II-Tr. 19-24) that the Internal Revenue Service investigation was being conducted solely for a criminal purpose. With respect to the summons issued to the Irving Bank and Trust Co., petitioner argued that the Fourth and Fifth Amendments barred the Internal Revenue Service from obtaining documents relating to his business transactions (III-Tr. 20-22).²

Special Agent Manes testified that he had issued the summonses as part of an investigation to determine petitioner's correct tax liability (II-Tr. 9-11). He further testified that at the time the summonses were issued he had not decided whether to recommend criminal prosecution of petitioner and that the case had not been referred to the Department of Justice for criminal prosecution (II-Tr. 11-12).

¹ "II-Tr." refers to the transcript of the enforcement proceedings held in the district court on March 21, 1979.

² "III-Tr." refers to the transcript of the enforcement proceedings held in the district court on March 27, 1979.

At the conclusion of the enforcement hearing, the district court ordered the summonses enforced (III-Tr. 23). The court found that the investigation was not being conducted solely for a criminal purpose and rejected petitioner's constitutional objections to production of the records sought from the Irving Bank and Trust Co. (III-Tr. 22-23).

Petitioner thereafter filed a notice of appeal and a motion to stay execution of the enforcement order. The district court denied petitioner's motion for a stay. Petitioner then filed a motion for a stay of execution in the court of appeals, which was denied on April 16, 1979 (Pet. App. E). This Court denied petitioner's motion for a stay pending appeal on April 26, 1979 (Pet. App. F). The summoned parties thereafter complied with the summonses. On the government's motion, the court of appeals dismissed petitioner's appeal as moot (Pet. App. A).

1. The court of appeals correctly held that petitioner's appeal became moot once the parties complied with the summonses at issue. A case is moot when there is nothing further for the court to act upon, when the controversy has ceased to exist, and when it is impossible for the court to grant effective relief. See, e.g., *St. Pierre v. United States*, 319 U.S. 41 (1943); *Atherton Mills v. Johnston*, 259 U.S. 13, 15 (1922); see also 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533, at 264-266 (1975). Here, once the summoned parties complied with the summonses, the controversy between the parties was at an end and it was impossi-

ble for the court to grant effective relief with respect to the question whether the Internal Revenue Service should have been allowed to examine the records.

In holding that the case is moot, the decision below is in accord with prior decisions of the court below and with the decisions of four other circuits. *E.g.*, *Barney v. United States*, 568 F.2d 116 (8th Cir. 1978); *Kurshan v. Riley*, 484 F.2d 952, 953 (4th Cir. 1973); *United States v. Lyons*, 442 F.2d 1144 (1st Cir. 1971); *Baldrige v. United States*, 406 F.2d 526 (5th Cir. 1969); see *SEC v. Laird*, 598 F.2d 1162 (9th Cir. 1979).

Contrary to petitioner's argument (Pet. 7-8), the enforcement order issued by the district court does not preclude him from challenging the introduction into evidence of the summoned material in a later civil or criminal proceeding. Because the production of the summoned material by the third parties caused this case to become moot, petitioner is free to raise any defenses he may have to its use as evidence in any subsequent proceeding against him. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *United States v. Blue*, 384 U.S. 251 (1966); *Sanford v. United States*, 358 F.2d 685 (5th Cir. 1966).

2. Petitioner further argues (Pet. 5) that the court of appeals' dismissal of his appeal as moot conflicts with *United States v. Friedman*, 532 F.2d 928, 931 (3d Cir. 1976). See also *United States v. Waltman*, 525 F.2d 371, 373 n.1 (3d Cir. 1975). In *Friedman*, *supra*, the court ruled that an appeal of

an order enforcing an internal revenue summons did not become moot on account of compliance by the summoned party. In that case, however, "there ha[d] been incomplete compliance with the court's order since the IRS ha[d] not yet taken [the] testimony [of one of the summoned parties]" (532 F.2d at 931). Moreover, the court premised its decision in part on the view that a holding in the summons enforcement proceeding could affect the possible use of the material in any subsequent criminal or civil proceeding. As we have pointed out (*supra* page 4), the enforcement of the summonses in this case would not prevent petitioner from challenging the introduction of the summoned material in a subsequent proceeding against him.

3. Finally, petitioner contends (Pet. 5) that the courts below erred in denying his motion for a stay pending appeal. But petitioner did not meet his burden of showing that the facts of this case warranted a stay. An applicant for a stay must show (1) a likelihood that he will prevail upon appeal; (2) irreparable injury unless the stay is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest. *O'Brien v. Brown*, 409 U.S. 1, 3 (1972); *In re Grand Jury*, 583 F.2d 128 (5th Cir. 1978); *Martinez Rodriguez v. Jimenez*, 537 F.2d 1, 2 (1st Cir. 1976); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); *Pitcher v. Laird*, 415 F.2d 743 (5th Cir. 1969); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C.

Cir. 1958) ; see *Coleman v. Paccar Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers).

Petitioner does not assert that there is a likelihood that he will prevail on the merits on appeal or that a stay of enforcement will not harm the public interest. Rather, his only argument (Pet. 7) is that he will suffer irreparable injury unless relief is granted because compliance renders his case moot, and, thus, deprives him of an effective appeal from his challenge to the legality of the summonses. That argument would justify the enforcement of all summonses and subpoenas until their validity is determined on appeal, with resulting unwarranted disruption of the enforcement of the tax laws and other aspects of the administration of justice. It is, instead, proper to remit petitioner to the raising of any defenses he may have to the evidentiary use of the summoned material in any subsequent proceeding against him that may arise.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1980